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**DIGITAL TRANSFORMATION OF THE
POLISH LABOUR MARKET UNDER
THE RECENT REGULATIONS ON
REMOTE WORK**

ABSTRACT

The outbreak of the pandemic resulted in an increased interest in remote work and the use of digital technologies while performing work. The regulation pertaining to remote work, which the legislator introduced into Polish law at the time, was an ad hoc measure to counteract the pandemic and its corollaries. In response to the expectations of employees and employers, lawmakers incorporated remote work into the Labour Code as a permanent solution to be applied under ordinary conditions. Due to the distinctive manner in which remote work is carried out, the new regulation requires assessment in terms of its capacity to protect the interests of the parties to the employment relationship and meet the challenges of the labour market.

KEYWORDS: *remote work; labour market digitalization; digital skills; pandemic; telework*

INTRODUCTION

Digital technologies do not simply affect the volume of jobs, facilitating employers to contract out work. They also change how jobs are actually performed, enabling workers to be more mobile as they work remotely.^[1] Following the outbreak of the pandemic, remote work has become more popular as many companies and institutions have adopted such a modality in order to keep their employees safe while ensuring continued delivery of services. According to Eurostat, nearly 40% of employees telework because of the pandemic.^[2] In contrast, in 2019, home-based work had been performed by 5.4% of the EU employed population aged 15-64.^[3] The COVID-19 pandemic has caused remote work to become widespread in Poland as well. According

^[1] L. Charles, S. Xia, A. P. Coutts, *Digitalization and Employment. A Review*, International Labour Organization, Geneva 2022, p. 20.

^[2] D. Ahrendt, J. Cabrita, E. Clerici, J. Hurley, T. Leončikas, M. Mascherini, S. Riso, E. Sandor, *Living, working and COVID-19, COVID-19 series*, Publications Office of the European Union, Eurofound, Luxembourg 2020, p. 31.

^[3] Eurostat, *How usual is it to work from home?*, 24.04.2020, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200424-1> (last access: 22.08.2023).

to Statistics Poland, at the end of Q1 2020, the proportion of persons who worked remotely due to the epidemic in the total number of employees was 10.8%.^[4] Their share peaked towards the end of Q1 2021, when it amounted to 14.2%.^[5] In subsequent quarters, however, the percentage of those working remotely began to decline. It dropped to 6.9% by the end of Q4 2021^[6] and then to 3.4% in the following year.^[7] The above trend invites considering remote work as a response to labour market challenges.

LEGISLATIVE GROUNDS OF REMOTE WORK IN POLAND

Remote work was introduced into Polish law during the pandemic by virtue of the so-called COVID-19 Act.^[8] According to Article 3(1) of that Act, in order to counteract COVID-19, an employer was entitled to request that, for a definite period of time, an employee perform the work specified in the employment contract outside the place of its regular performance. During the pandemic, such a mode of working was vital for employees because it decreased the risk of contracting the SARS-CoV-2 virus, as well as in view

^[4] Statistics Poland, Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w IV kwartale 2020 r., <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace> (last access: 25.08.2023).

^[5] Statistics Poland, Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w pierwszym kwartale 2021 r., <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace> (last access: 25.08.2023).

^[6] Statistics Poland, Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w czwartym kwartale 2021 r., <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace> (last access: 25.08.2023).

^[7] Statistics Poland, Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w czwartym kwartale 2022 r., <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace> (last access: 25.08.2023).

^[8] Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych [Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them] (Journal of Laws of 2021, item 2095, as amended, and Journal of Laws of 2022, item 202, as amended), hereinafter as *COVID-19 Act*, Article 3.

of family reasons, e.g. enabling them to reconcile work and family duties when children and adolescents attended school remotely at home. For employers, on the other hand, remote work meant a reduced risk of employee absence due to sick leave or quarantine, thus minimizing disruption to their business.^[9] Even so, the regulation in question was a short-term measure^[10], having been adopted in connection with the epidemic situation and could only be applied during that period.

As remote work spread and its advantages were recognized by both sides of the employment relationship, representatives of employees' and employers' organizations called for a regulation on remote work to be incorporated into the legal order as a permanent institution, which applied under ordinary conditions.^[11] The Act of December 1, 2022^[12] amending the Labour Code and certain other Acts introduced remote work to the Labour Code (Article 67¹⁸ – 67³⁴). The amendment also repealed Article 3 of the COVID-19 Act and the provisions of the Labour Code on telework.^[13] The new regulations on remote work came into force on April 7, 2023.

THE CONCEPT OF REMOTE WORK

Article 67¹⁸ Labour Code defines remote work as work that may be performed, in full or in part, at a place named by the employee and each time agreed upon with the employer, which may be the employee's place of residence, in particular with the use of the means of direct communication over

^[9] More broadly in J. Jaskulska, B. Rutkowska, *Remote working in Poland. Legal and social perspective (opportunities and threats)*, *Praca i Zabezpieczenie Społeczne* 2022/3, p. 29.

^[10] Sejm of the 9th Term, Uzasadnienie druku sejmowego nr 2335, Rządowy projekt ustawy o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2335> (last access: 22.08.2023), p. 3.

^[11] Sejm of the 9th Term, Uzasadnienie druku sejmowego nr 2335, pp. 3-4.

^[12] Journal of Laws of 2023, item 240.

^[13] More broadly in M. Mędrala, *Zdalne świadczenie pracy – uwagi de lege lata i de lege ferenda*, (in:) K. Marak (ed.), *Odpowiedzialność za niewykonanie lub nienależyte wykonanie zobowiązania gospodarczego. Zagadnienia prywatno – i publicznoprawne*, Wydawnictwo Uniwersytetu Ekonomicznego we Wrocławiu 2020, p. 152 ff.

distance.^[14] It follows from the above definition that the regulation applies to both full-time remote work and hybrid work, i.e. performed partly remotely and partly at the workplace.^[15] The location where the remote work is carried out is always indicated by the employee and agreed with the employer in each case. It may be the employee's place of residence or any other place chosen by the employee and approved by the employer. As a result, remote work does not include those instances where work is performed in remote work facilities rented by the employer. In the literature, this restriction is considered too far-reaching, being informed by the realities of the pandemic, when remote work was primarily carried out at home.^[16]

The definition of remote work does not posit a regularity requirement. Nevertheless, in order for the pertinent regulation to apply fully, remote work must be performed for at least 25 days in a calendar year. If performed for a shorter period of time, it constitutes a distinct legal institution, i.e. occasional remote work, which is provided for in Article 67³³ LC. It is only by way of example that the Labour Code states that remote work may be performed using means of direct communication over distance. It does not impose an obligation on the employee to be in constant contact with the employer. Nor does it require that the outcomes of the work be conveyed remotely.^[17]

INTRODUCTION OF REMOTE WORK

In principle, the performance of remote work by an employee requires an arrangement between the parties to an employment contract. Pursuant to Article 67¹⁹ LC, such an arrangement may be made upon concluding an employment contract or during the employment relationship. In the latter

^[14] Provisions of the Labour Code cited in this paper follow the translation published online on the Legalis platform.

^[15] M. Tomaszewska, *Elementy konstruktywne pracy zdalnej*, Studia z Zakresu Prawa Pracy i Polityki Społecznej 2023/30/3, p. 213.

^[16] A. Sobczyk, Komentarz do art. 67¹⁸ k.p. (in:) A. Sobczyk (ed.), *Kodeks pracy. Komentarz*, C.H. Beck 2023, Legalis, thesis 1.

^[17] A. Sobczyk, Komentarz do art. 67¹⁸ k.p., Legalis, thesis 7.

case, alteration of the mode of performing work may be agreed either upon the employer's initiative or upon the employee's application filed in paper or electronic form. In the literature, the introduction of remote work by virtue of the agreement of the parties has been found to constitute the basic solution.^[18]

The employer is, in principle, under no obligation to endorse the application of the employee to perform the work remotely. However, Article 67¹⁹ § 6 LC provides for an exception from the rule, whereby the employer shall be obliged to grant the application for performance of remote work filed by an employee referred to in Article 142¹ § 1 points 2 and 3. Specifically, this concerns an employee-parent of a child holding the certificate of severe and irreversible disability or incurable, life-threatening condition that developed during gestation or delivery, an employee-parent of a child holding a disability certificate or a certificate of a moderate or severe degree of disability, provided for in regulations on occupational and social rehabilitation and on employing disabled as well as an employee-parent of a child holding an opinion on the need for the early support of the child's development, a certificate of the need for special education or a certificate of the need for revalidation and education activities, as referred to in the provisions of the Education Law Act of 14 December 2016. Such an entitlement is also accorded to a pregnant employee, an employee bringing up a child of up to 4 years of age, and an employee taking care of another member of the immediate family or another person sharing the household with the employee, such persons holding a certificate of disability or a certificate of a significant degree of disability. The employer may refuse to grant the application of those employees only where it is impossible due to the work organization or the type of work performed by the employee. The employee shall be informed of the reason for a refusal to grant the employee's application, in paper or electronic form, within seven business days of the day of the application filing by the employee.

Work may also be performed remotely following instructions from the employer. This is possible in the period of a state of emergency, an epidemic crisis situation or a state of epidemic being in force and during three months following their cancellation or in the period where it is temporarily impossible

^[18] M. Mędrala, *Praca zdalna w administracji*, LEX/el. 2023.

for the employer to ensure safe and hygienic working conditions at the employee's existing workplace due to a force majeure operation. It is therefore admissible to issue such an instruction only in extraordinary circumstances which remain beyond the control of the employer and solely with regard to a specific period of time. It is stipulated that immediately before the issue of such an instruction, a statement, in paper or electronic form, be submitted by the employee to the effect that he/she has the premises and technical conditions to perform remote work. If the statement is not submitted by the employee, the employer cannot instruct them to perform the work remotely.^[19] The employer may withdraw the instruction to perform remote work at any time, at least two days in advance. They may exercise their prerogative, e.g. if the reason why remote work was instructed expires. Once the instruction to perform work remotely is withdrawn, the employee resumes working in the ordinary manner at the workplace proper. The notice of at least two days is to ensure that the employee has the necessary time to return to work under the previous conditions. The instruction to perform remote work may also be due to a change concerning the premises and/or technical conditions and preventing the employee from performing remote work. In such a case, the employee shall immediately inform the employer to this effect and the employer shall immediately withdraw the instruction to perform remote work. It should be noted that the COVID-19 Act also admitted the possibility of imposing remote work on an employee by means of an instruction from the employer. This regulation aroused controversy in the doctrine^[20], which abated when it was clarified that the instruction may be issued if the employee has the skills, technical capabilities and premises to perform such work while the type of work itself allows it. (Article 3(3) COVID-19 Act).

^[19] M. Gładoch, *Praca zdalna. Kontrola trzeźwości. Nowelizacja Kodeksu pracy. Komentarz Linia orzecznicza*, C.H. Beck 2023, p. 63 ff.

^[20] More broadly in K.W. Baran, D. Książek, W. Witoszko, *Komentarz do art. 3 ustawy COVID-19*, (in:) K. W. Baran (ed.), *Komentarz do niektórych przepisów ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych*, [in:] *Tarcza antykryzysowa 1.0 – 4.0, ustawa o dodatku solidarnościowym i inne regulacje, jako szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19. Komentarz*, Wolters Kluwer 2020, LEX, thesis 3.1.

PERFORMING REMOTE WORK: SELECTED ASPECTS

In line with Article 67²⁰ LC, the rules for performing remote work shall be determined in an agreement concluded between the employer and the establishment's trade union organization or trade union organizations. When the agreement is not concluded within 30 days after the presentation by the employer of a draft agreement, as well as when no establishment's trade union organization operates at the employer, the employer shall specify the rules for performing remote work in the regulations taking into consideration the arrangements made with establishment's trade union organizations in the course of agreeing upon the agreement, whereas if there is no establishment's trade union organization—upon consultation with the employees' representatives chosen according to the procedure adopted at that employer. The performance of remote work shall also be admissible in the case where the agreement has not been concluded or where the regulations have not been issued. In such case, the employer shall set out the rules for performing remote work in the instruction to perform remote work or in an agreement concluded with the employee, respectively.

The Labour Code stipulates certain specific obligations of the employer with respect to remote work. According to Article 67²⁴ LC, the employer should provide for the employee performing remote work the materials and working tools, including technical devices, which are necessary to perform remote work. It has been observed in the literature that the obligation also comprises furnishings, including furniture, unless the employer agrees with the employee that the latter will make use of their own materials and equipment, provided that it meets the requirements of safe performance of work.^[21] An employer is also obliged to provide for an employee performing remote work, the installation, servicing, and maintenance of the working tools, including technical devices, which are necessary to perform remote work or cover the necessary costs related to them, as well as cover the costs of electrical energy and telecommunication services which are necessary to perform remote work. Further obligation resting with the employer is to cover other costs

^[21] A. Sobczyk, Komentarz do art. 67²⁴ k.p., Legalis, thesis 1.

that are directly related to the performance of remote work if the reimbursement for such costs is provided for in the agreement, in the regulations, or in the instruction, as well as provide for the employee performing remote work all training and technical assistance which may be necessary to perform such work. Employers must also create a procedure for protecting personal data in remote work (Article 67²⁶ LC).

An employee who performs remote work is entitled to all employee rights unless some of such rights are excluded by a special provision. Art. 67²⁹ LC prohibits the employer from treating an employee performing remote work in a manner that is less advantageous in respect of establishing and terminating employment relationships, employment conditions, promotion, and access to training in order to raise occupational qualifications than other employees employed at the same or similar work, taking into consideration the differences connected with the conditions of performing remote work. Under this provision, an employee cannot be discriminated against in any manner due to performing remote work or refusing to perform such work.

The Labour Code specifically provides for the obligations of the employer regarding work safety and hygiene in the course of remote work.^[22] A remote worker arranges the workplace on their own outside their place of employment, which is why certain duties of the employer do not apply (Article 67³¹ § 1-3 LC). This includes, e.g. the obligation to provide first aid in emergencies, arrange the workplace in line with applicable regulations as well as rules of work safety and hygiene, and ensure adequate hygienic and sanitary facilities for their employees. Moreover, one cannot fail to note the prohibition of remote performance of work stated in Article 67³¹ § 4 LC. Pursuant to this, remote work excludes hazardous tasks and work that exceeds physical agent standards for living premises. The prohibition further applies to work with hazard-causing chemical agents referred to in the provisions on safety and hygiene of work involving the existence of chemical agents at the workplace, as well as work which involves the use or emission of harmful biological agents, radioactive

^[22] K. Jaśkowski, Komentarz do art. 67³¹ k.p., (in:) K. Jaśkowski, E. Maniewska, *Kodeks pracy. Komentarz aktualizowany*, LEX/el. 2023, thesis 1.

substances and other substances or mixtures emitting onerous odours, and also which causes heavy soiling.

The employer's distinct obligations relating to the health and safety of remote work also involve the requirement to draft information on the occupational hazards of performing remote work (Article 67³¹ § 5 LC). In particular, the assessment of the occupational risks to which an employee working remotely is exposed must take into account the impact of such work on vision, and the musculoskeletal system as well as the psychosocial circumstances and ramifications of such work.^[23] Prior to allowing their employee to work remotely, the employer acquaints the worker—who confirms that this has taken place—with the occupational risk assessment and the information on the principles of safe and healthy work, with which the employee is obligated to comply. (Article 67³¹ § 5 LC).

It may be noted that according to Article 67²⁸ § 1 LC, the employer shall have the right to carry out the control over the performance of remote work by an employee, the control in the field of work safety and hygiene and the control over compliance with the requirements in the field of information security and protection, including the personal data protection procedures. Nonetheless, the control shall be carried out in consultation with the employee at the place of performing remote work during the employee's working hours. Furthermore, Article 67²⁸ § 2 LC stipulates in more precise terms that the employer shall adjust the manner of carrying out the control to the place of performing remote work and to the work type. The performance of control acts shall not violate the privacy of an employee performing remote work or other persons nor render difficult the use of home space in accordance with its intended purpose.

^[23] More broadly in S. Kryczka, *Organizacja pracy zdalnej w kontekście technicznego bezpieczeństwa pracy*, LEX/el. 2023.

CONCLUSIONS

Following the amendment to the Labour Code, remote work was established as a permanent solution that may be applied in typical conditions as opposed to extraordinary circumstances such as epidemics. Since the remote work regulation was formulated without stating specific technological requirements, such as the need to use remote communication, a wide range of possible applications became available. The Labour Code provides for various modes of introducing remote work, whether by agreement of the parties, at the privileged request of the employee, or at the employer's instruction. Consequently, remote work may be taken advantage of not only when agreed by the parties but also when the individual interest of the employer or employee requires it. Pertinent provisions restrict the admissibility of introducing remote work on the grounds of the employer's instructions or the employee's privileged requests, safeguarding the interests of the other party to the employment relationship. The fact that the employee who undertakes remote work states where it will be performed distinguishes remote work from its traditional equivalent, where it is the employer who defines the place of work and bears all costs. This difference is reflected in a particular alignment of the rights and obligations resting with the parties to the employment relationship, such as the limited obligations of the employer to ensure safe and healthy working conditions. The new remote work regulation may promote the spread of this form of performing work, particularly in professions that require digital skills from employees. Digitalization and remote work are often interrelated. The more digital skills an occupation requires, the more common it is for remote work to be offered.^[24] However, since the provisions on remote work in the Labour Code have been in effect for a relatively brief period of time, it is difficult to assess their impact on the labour market in Poland.

^[24] See more broadly in L. Charles, S. Xia, A. P. Coutts, *Digitalization and Employment. A Review*, International Labour Organization, Geneva 2022, p. 20, with literature cited there.

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